Supreme Court, U. S.
FILED
APR 3 1998
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(3)

No. 97-1384

In The

Supreme Court of the United States

October Term, 1997

A. EUGENE MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

I. RESPONSE TO THE GOVERNMENT'S STATEMENT OF FACTS

The government's restatement of the facts corrects nothing in the Petition, distorts the record, and ineffectually attempts to divert attention from the merits by interjecting matters that are either erroneous or irrelevant.

1. The government asserts that Mr. Miller received "additional letters" from the Service that "repeated" the Service's position "that the time period for a TSA rollover could not be extended beyond the 60 days provided in the statute." Opp. Br. 5. But the record discloses no IRS letter or statement to Mr. Miller regarding his Treas. Reg. § 1-9100-1 extension request until April 25, 1995. Moreover, "the 60 days" are not "provided in the statute." As the 1995 IRS letter reveals, to reach this conclusion one must consult a cross-referenced provision in the Code and apply unstated "rules similar to [those] rules." App. 37.

2. The government notes that IRS letters did not state or imply that it was withdrawing its purported notice of disallowance or that it was agreeing to extend the limitations period. Opp. Br. 5. Mr. Miller's basic claim (Issue 1) is the limitations period was not properly triggered until April 25, 1995; this issue does not involve any claim of withdrawal or extension of a viable notice beforehand. The government's point also has no relevance to resolution of the question of law presented by Issue 2.

3. The government characterizes Mr. Miller's contacts with various IRS offices as an effort to get the Service "to reconsider" the January 13, 1992 "disallowance." *Id.* This dovetails with its emphasis on the Fourth Circuit's observation that Code § 6532(a)(4) "expressly provides that reconsideration by the IRS of a disallowed claim will not toll the running of the two-year period for filing suit." Opp. Br. 6. As question-begging, this argument has no peer. There can be no "reconsideration" of that which has never been given "consideration." *See* Pet. 18 n.3.

4. Similarly irrelevant is the government's and the lower court's emphasis on Mr. Miller's failure to seek an extension of the two-year limitations period under § 6532(a)(2). Opp. Br. 5-6. There is no need for extension of a period that has not begun to run. Moreover, on this record, there is no evidence that Mr. Miller had even a remote chance of having such an extension request granted before the second anniversary of the January 13, 1992 notice. At that point, he was still almost a year from completing his uphill climb to a first face-to-face meeting with National Office personnel with the authority (and expertise) to consider his § 1-9100-1 request. Pet. 7.

5. The government asserts that Mr. Miller has incorrectly characterized IRS publications as misleading and wrong. Opp. Br. 3 n.1. The cited reference (App. 39) does not address much less demonstrate this. In the trial court, the government sought dismissal on the pleadings with extrinsic reference to only one exhibit, the purported disallowance notice. Pet. 3. But in detailed chapter and

verse, Mr. Miller's complaint and declaration in opposition explained why he had been misled by IRS publications and forms.[1] The government is surely aware of the settled rule that in passing on a motion to dismiss for lack of subject matter jurisdiction, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The government is evidently concerned that its jurisdictional arguments cannot stand on their own. But propping them up with unsound, unsubstantiated and irrelevant points serves only to weaken the response further.

6. The same can be said of the rest of the government's attempt to blame the victim, i.e., irrelevant argument that Mr. Miller was negligent in failing to read statutes and regulations and failing to consult a tax professional. Opp. Br. 3 n.1. As the government well knows, one cannot point to any statutory or regulatory provision

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[1] Pet. 3. As Mr. Miller's 14-page declaration filed in opposition to the government's motions to dismiss explained, without contradiction by the government, the 1989 tax year version of IRS publications specifically addressed to retirement plan distributions, i.e., Publications 571 and 575, "state that, in general, the rules applicable to TSA distributions are the same as those for other retirement plan distributions, and a long list of particular distributions ineligible for averaging treatment nowhere mentions TSA distributions." Miller Declaration ¶ 5 at 2-3 (Aug. 6. 1996). The next year the detailed list of ineligible distributions (eleven in all) was lengthened by adding TSA distributions. *Id.* ¶ 6 at 3 and Exhibit G thereto at 2-4. Based on this, Mr. Miller's complaint unequivocally alleges that "any reasonable person, giving the same careful consideration to these documents as did plaintiff, could only have reached the same reasonable conclusion that plaintiff reached." Complaint ¶ 9. App. 19-20.

that states that TSA distributions are not eligible for income averaging. Such ineligibility derives not from a prohibition "clearly reflected," *id.*, in the Code and regulations, but only by negative inference from the Code's failure to expressly allow it (i.e., the Code's failure to mention section 403(b) in particular in the "lump sum distribution" definition in § 402(e)(4)(A)). *See* App. 39. If allowed to proceed to trial, Mr. Miller will demonstrate the reasonableness of his reliance on his own abilities and relevant Service forms and publications rather than a "tax professional."[2]

7. Yet another diversion is the government's discussion of Mr. Miller's litigation against his plan administrator. Opp. Br. 5 n.2. Perhaps the government is attempting to imply that Mr. Miller's claims must be baseless because his ERISA claims were dismissed at the district court level. But four Justices of this Court would probably have concluded otherwise as to his ERISA claims.[3]

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[2] For example, in response to the government's motion to dismiss, Mr. Miller documented these uncontradicted – and indisputable – facts: (1) the "problem with the IRS documents relied upon by plaintiff persisted for only the year in which plaintiff consulted them," and he would not have been misled by them in any other year. Complaint ¶ 10. App. 20; and (2) in early 1991, the "tax professionals" at Mr. Miller's TSA plan administrator that advised him of his error relied on the next-year's version of these same publications. Pet. 4.

[3] Mr. Miller's ERISA complaint was dismissed at the district court level while certiorari was pending in several cases in this Court on the controlling point of law – the availability of damages for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). When this Court decided this question by a 5-4 vote adversely to Mr. Miller's claim, *Mertens v. Hewitt*

Alternatively, the government may be suggesting that Mr. Miller was preoccupied with his ERISA litigation and failed to diligently pursue his refund claim with the Service. But Mr. Miller's diligence, well documented in the record, is not in issue here. Moreover, the ERISA litigation was over in June 1993, long before Mr. Miller ever was able to get someone at IRS to address his § 1-9100-1 request, and the timely pursuit of his refund claim is extensively documented in the trial court, uncontradicted by the government. Again, if the government truly believed it is entitled to prevail under Code § 6532(a) as a matter of law, it would not be ineffectually nitpicking the facts.

II. RESPONSE TO THE GOVERNMENT'S ARGUMENT

The government takes only selected issue with the reasons advanced for granting the petition and wraps its response around defense of the decision below. Opp. Br. 6. In effect, the government does not dispute petitioner's claim that, whatever the outcome, Issue 1 is an important one for this Court to decide. And as to both Issue 1 and Issue 2, the government's argument that there is no conflict is, in reality, nothing more than argument addressed to the merits. Petitioner will not belabor the merits here, but there are some defects in the government's response that should be noted.

Associates, 508 U.S. 248 (1993), Mr. Miller voluntarily dismissed his appeal, then pending in the Fourth Circuit, Dkt. No. 92-2448.

1. The government fails in its attempt to demonstrate that Mr. Miller's principal claim (Issue 1) is factually and legally unsound.

a. The government absurdly claims that the tag line in the purported disallowance – "Also, a rollover from a TSA to an IRA must be made within the 60-day period." Opp. Br. 5 – "expressly responded" to Mr. Miller's request that "the IRS should exercise discretion to excuse [the 60-day requirement] in his case." *Id.* at 7. The tag line is characterized as a "clear denial of the refund claim." *Id.* If this is the Service's idea of clarity, coming as it does after a broken sentence "disallowing" the claim on a ground not presented, Pet. 5-6, taxpayers would perhaps be better served by the government's alternative line of defense, i.e., "there is no requirement in the Internal Revenue Code or in the regulations that the notice of disallowance contain any explanation whatsoever of the reasons for the disallowance." *Id.* at 8. But in either case, the government's extraordinarily lax interpretation of Congress' expectation of merits-based consideration of refund claims (a) is inconsistent with its own internal procedures, Pet. 12; and (b) constitutes an untenable shift of its statutory responsibilities to the courts. *Id.* at 13-14. The government's response ignores both of these points.

b. The government cites the taxpayer's freedom to initiate suit on a refund claim without a Service decision on the merits six months after filing as proof that Congress did not mean merits-based disallowances were the rule when it enacted § 6532(a). Opp. Br. 8. But the government ignores the caselaw making clear that the waiting period is for the explicit purpose of giving the Service time to consider the merits. Pet. 11-12, 13-14. That

Congress also expected **timely** decisions, and concluded that the Service should not be allowed to keep a taxpayer waiting more than six months if it had not yet decided the claim, changes nothing. The government suggests that tax refund litigation is "frequently," Opp. Br. 8, commenced via this pre-disallowance-six-month-waiting-period option. The Service does not say whether the proportion of such cases to all refund cases amounts to more than the minor exception that proves the rule. Even if the number is more than trivial, however, it would only suggest that Congress' judgment about the time needed for a decision on the merits in almost all cases was a little off. It would still not cast doubt on the basic presentment-disallowance-litigation scheme for refund claims in the Code. Pet. 11-15.

c. No slave to understatement, the government asserts that the notice Mr. Miller received was "crystal clear," Opp. Br. 7, and "could not have been clearer in informing petitioner that his claim had been disallowed." *Id.* at 9. As to certain aspects of the notice, Mr. Miller agrees and has so informed the Court: "As the Court of Appeals has observed, the notice was unambiguous in certain respects: it correctly identified the tax year, the type of tax, and the amount of refund claimed." Pet. 5. But left unanswered is Mr. Miller's claim that none of this matters if there has been no "disallowance," i.e., no decision reflecting a rational nexus between request and denial, Pet. 12, either on the face of the notice or at least in the Service's records. *Id.* at 17.[4]

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[4] At no point in this litigation has the Service suggested that there exists any pre-disallowance (i.e., pre-January 13,

d. The government expends most of its effort attempting to distinguish the cases cited by petitioner. Opp. Br. 9-11. It examines the trees but overlooks the forest. The transcendent principle in these cases is that the resolution of the § 6532(a) issue turns on whether there was Service consideration of the merits of the refund claim. Put another way, the courts in all these cases understood the obvious linkage between the taxpayer's right to litigate his refund claim in federal court and his obligation to first fully present his claim to the Service and await a decision. If the statutory scheme were more doubtful in this respect, the government's exercise might have some probative force, but all it succeeds in demonstrating is that no two cases are exactly alike. For example, in *Union Commerce Bank v. United States*, 463 F. Supp. 842 (N.D. Ohio 1978), *aff'd*, 638 F.2d 962 (6th Cir. 1981), the government was successful in triggering the limitations period because it persuaded the court that it had "considered the merits of the refund claim." 638 F.2d at 963. The government offers no explanation why, if consideration of the merits of an adequately presented claim may be used as a limitations **sword** by the government under § 6532(a), its failure to consider the merits is not a **shield**. Similarly, the government fails to explain why Mr. Miller's situation, where at least one ground for refund was not considered, is distinguishable in principle from the situation where, as even the government admits, assertion of "a new ground for a refund begins the claim-disallowance process anew." Opp. Br. 11. *See* Pet. 18.

1992) internal Service records that reflect consideration and rejection of Mr. Miller's second ground for refund.

e. This reply is neither the time nor place for a complete response to the government's erroneous views regarding Issue 1. Upon plenary consideration, petitioner will more fully demonstrate that the interrelationship of administrative and judicial decisionmaking on tax refund claims admits of only one conclusion: the January 13, 1992 "disallowance" received by Mr. Miller did not trigger the § 6532(a) limitations period as to the second of his two grounds for refund.[5]

2. The government's response to Issue 2, Opp. Br. 11-12, also exhibits a penchant for irrelevant argument. What Mr. Miller said about *First Alabama Bank, N.A. v. United States*, 981 F.2d 1226, 1230 n.5 (11th Cir. 1993), is that "a taxpayer in a refund suit may invoke the Service's failure to follow its own rules and procedures as evidence 'that what in fact transpired was not' what the Service claimed it to be," and that the applicable legal standard was "reasonable confusion on the part of the taxpayer. . . . " Pet. 22. Rather than contest this reading of *First Alabama*, the government apparently claims that, on

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[5] For example, the government will be hard-pressed to explain how *pro forma* disallowances are to fit into a scheme that absolutely precludes refund litigants such as Mr. Miller from varying in court either the factual or the legal basis for the claim presented to the IRS. As with the rest of the statutory scheme, this variance rule is designed

> to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination.

Boddie-Noell Enterprises, Inc. v. United States, 36 Fed. Cl. 722, 729 (1996) (citations and internal quotations omitted).

the facts, Mr. Miller could not have been "reasonably confused." Opp. Br. 11. Mr. Miller disagrees, but that disagreement is completely beside the point at this stage. What is relevant is Mr. Miller's claim that both the government and the Court of Appeals misread petitioner's reliance on the *First Alabama* rule, both in the main appeal and on reconsideration, such that the Fourth Circuit's handling of the legal issue is in conflict with that of the Eleventh Circuit. Pet. 22. By not answering this point, the government has conceded it. Supreme Court Rule 15.2. Again, without regard to how Issue 2 should be decided in this case, the issue is an important one, worthy of this Court's consideration if certiorari is granted as to Issue 1.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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